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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICK KELLY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it determined that statements made by the victim shortly after a domestic dispute were admissible at trial as excited utterances under ER 803(a)(2)?

2. If it was error to admit the statements of the victim made at the scene as excited utterances, was any error harmless if the victim testified at trial to the same details and was subject to cross-examination regarding any previous statements made to law enforcement?

3. Whether the \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) and the \$500 victim assessment imposed under RCW 7.68.035(1)(a) are mandatory or discretionary fees?

4. Does the mandatory \$200 criminal filing fee, RCW 36.18.020(2)(h), and \$500 victim assessment, RCW 7.68.035(1)(a), violate the Equal Protection Clause if GR 34 authorizes civil litigants a waiver of fees imposed under statute?

II. STATEMENT OF THE CASE

Rick Kelly was charged by information in the Spokane County Superior Court with second degree assault and unlawful imprisonment. CP 1. A jury found the defendant guilty of the lesser-included offense of fourth degree assault and not guilty of unlawful imprisonment. CP 51-52.

Substantive facts.

On September 15, 2016, sheriff deputies responded to a domestic dispute at a residence located at 14522 North Hamilton Street in Spokane County. RP 102. Upon their arrival, Rachel Pritchard was standing behind a car at the residence and Mr. Kelly was on the front porch. RP 102-03, 118. Ms. Pritchard was hysterical, very emotional, and distraught. RP 103, 119. Mr. Kelly appeared somewhat calm. RP 103.

Deputy Branson Schmidt asked the defendant what had occurred.¹ RP 103. Mr. Kelly denied any wrongdoing and asserted he was not in a relationship with Ms. Pritchard. RP 104. Approximately three to five minutes had elapsed and Deputy Schmidt then spoke with Ms. Pritchard. RP 105. As Ms. Pritchard spoke with the deputy, the conversation was interrupted multiple times because Ms. Pritchard wept and sobbed. RP 105, 109. Deputy Schmidt described Ms. Pritchard's demeanor as "very hysterical" throughout the interview. RP 105-06. During the conversation, the deputy observed a red mark on Ms. Pritchard's throat. RP 106.

Ms. Pritchard told Deputy Schmidt that she went to the basement of the residence to retrieve her laptop. RP 110. Mr. Kelly told her that he

¹ The lower court conducted a CrR 3.5 hearing and determined the defendant's statements would be admissible at the time of trial. RP 71-85 (testimony), 85-90 (ruling). The findings of fact and conclusions of law regarding the hearing have not been designated.

needed to erase his history from the computer before she could have it. RP 110. As Mr. Kelly erased the computer history, Ms. Pritchard grabbed a cell phone. RP 110. Thereafter, Mr. Kelly wrapped his arm around Ms. Pritchard's neck and placed pressure against her throat, for approximately ten seconds. RP 110. At the scene, deputies urged Ms. Pritchard to seek medical attention. RP 114, 122.

Thereafter, Deputy Schmidt again spoke with Mr. Kelly. RP 111. Once more, he denied any wrongdoing. RP 111. Mr. Kelly stated he had been in a sexual relationship with Ms. Pritchard for the last several months and he was living at the residence, but denied being in a relationship with Ms. Pritchard. RP 111.

At trial, Ms. Pritchard testified that on the day of the incident, the defendant was residing at her residence. RP 134, 137. Ms. Pritchard and Mr. Kelly had been arguing for several days. RP 139-40, 143. On the day of the event, Ms. Pritchard asked Mr. Kelly for her laptop as she needed it for work. RP 147. An argument ensued as Mr. Kelly indicated Ms. Pritchard should have given him notice as he needed to remove his family law documents and other court matters from the computer. RP 148, 157. As Ms. Pritchard reached for her cell phone, Mr. Kelly forced her onto a bed and grabbed her throat by the crook of his forearm. RP 149-50, 159. Ms. Pritchard was unable to breathe for approximately 10 seconds. RP 150,

162. After being released, Ms. Pritchard called 911. RP 153. She also called family members and asked that they come to the house and remove the children before law enforcement's arrival. RP 153-54. Contemporaneously, Mr. Kelly showered and changed his clothing. RP 154. It took deputies approximately 20 to 30 minutes to arrive at the scene. RP 154.

On September 15, 2016, Physician Assistant Michael Tuccio, treated Ms. Pritchard at the Holy Family Hospital emergency room and determined she had a cervical strain, consisting of injuries to the neck. RP 168-71. Mr. Tuccio also observed redness around Ms. Pritchard's neck. RP 172. Ms. Pritchard experienced soreness in her throat and bruising several days after the event. RP 155-56.

Mr. Kelly testified he wanted to end the relationship on the day of the incident. RP 190-91, 208. At the time of the event, Mr. Kelly was clearing his court files from Ms. Pritchard's laptop computer. RP 197, 207. Mr. Kelly asserted he and Ms. Pritchard simultaneously reached for an iPhone, which caused Ms. Pritchard to fall off the bed. RP 199-200, 204. Mr. Kelly denied placing his arm around Ms. Pritchard's neck. RP 204.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED A DEPUTY TO TESTIFY REGARDING STATEMENTS MADE BY THE VICTIM AT THE SCENE. THE VICTIM WAS DESCRIBED AS CRYING AND SOBBING WHILE SPEAKING WITH THE DEPUTY, AND REMAINED HYSTERICAL DURING THAT TIME.

Mr. Kelly argues Ms. Pritchard had the opportunity to fabricate her statement to the deputy at the scene and it did not qualify as an excited utterance. *See* Appellant's Br. at 4-7. He does so without identifying evidence from the record to support this claim.

Standard of review.

An appellate court reviews a trial court's determination that a hearsay statement fell within the excited utterance exception for abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7, 168 P.3d 1273 (2007); *State v. Davis*, 141 Wn.2d 798, 841, 10 P.3d 977 (2000). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Stated differently, the trial court's ruling will not be disturbed unless the reviewing court believes that no reasonable judge would have made the same ruling. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004).

Even though hearsay is generally inadmissible, ER 803(a)(2) provides that certain excited utterances may be admissible if "(1) a startling event occurred, (2) the declarant made the statement while under the stress

or excitement of the event, and (3) the statement relates to the event.” *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008).

1. Startling event or condition.

The first and second elements can be established with circumstantial evidence such as “the declarant’s behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made.” *State v. Young*, 160 Wn.2d 799, 810, 161 P.3d 967 (2007). *See also State v. Rodriquez*, 187 Wn. App. 922, 938, 352 P.3d 200 (2015) (victim had an ongoing state of fear which was evident from the 911 call, wherein the victim was breathing hard, had a frantic voice and was speaking in a hushed tone); *State v. Williamson*, 100 Wn. App. 248, 258-59, 996 P.2d 1097 (2000) (finding a startling event occurred based on the circumstantial evidence of the victim being described as upset, crying, and emotional); *Thomas*, 150 Wn.2d at 855 (finding a startling event occurred based on the circumstantial evidence of the declarant being described as “visibly shaken” and scared).

Here, the supporting evidence includes the victim’s physical appearance and emotional condition as observed by the responding deputies. More specifically, there was a red mark around Ms. Pritchard’s neck, which resulted in an injury, and it was consistent with her statements to the deputy that the defendant attempted to strangle her at the time of the

assault. In addition, Ms. Pritchard was hysterical and sobbing uncontrollably while in the presence of the deputies. There is sufficient corroborating evidence that a startling event occurred to satisfy the first element of the excited utterance test.

2. Declarant made the statement while under the stress of excitement of the startling event or condition.

Regarding the second element, the declarant must make the statement while still “under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969); *Thomas*, 150 Wn.2d at 853.² Courts generally consider (1) the amount of time between the event and when the declarant makes the statement and (2) the declarant’s visible level of emotional stress when making the statement. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992). The statement need not be completely spontaneous and may be in response to a question. *State v. Bache*, 146 Wn. App. 897, 904, 193 P.3d 198 (2008).

² Stated differently, the declarant must make the statement while still “under the influence of external physical shock” and without “time to calm down enough to make a calculated statement based on self-interest.” *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

It is reasonable to find that a victim is still under the stress of the startling event where the victim presents in a state of shock or is visibly upset when her statement is made, and there is no evidence of fabrication.

For example, in *Strauss*, 119 Wn.2d at 416-17, the court held that a rape victim was still under the influence of the attack when she made the statement even though more than three hours had passed. There, the victim appeared to be in a state of shock; the officer described the victim as “very distraught, very red in the face and crying.” *See, also, State v. Woods*, 143 Wn.2d 561, 599, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001) (a hearsay statement was admissible under the excited utterance exception after 45 minutes passed when the victim was “whimpering, like crying almost,” “very emotional, very distraught, clearly upset and in a lot of pain”); *Hardy*, 133 Wn.2d at 714 (admission of statements were upheld as excited utterances where the victims made statements to officers “just minutes” after a robbery, and an officer testified that the victims “were visibly shaken and excited” while relaying the events of a robbery, and that the statements appeared to be spontaneous).

Similarly, in *State v. Flett*, 40 Wn. App. 277, 278-79, 287, 699 P.2d 774 (1985), this Court held that a rape victim’s statement to her daughter made seven hours after the alleged incident, was admissible as an excited utterance. In *Flett*, the defendant raped the victim. She went to work

at a grocery store where she saw Flett's wife. This Court held that "events which transpired in the 7-hour period – the rape ... and the stress of contact with Mrs. Flett in the store just prior to the statement – were all part of a 'continuous process' satisfying the elements of the excited utterance exception." *Id.* at 278-79; *State v. Thomas*, 46 Wn. App. 280, 284-85, 730 P.2d 117 (1986), *affirmed*, 110 Wn.2d 859 (1988) (trial court properly admitted excited utterance testimony where declarant made statements six to seven hours after the event and no intervening influences rendered statements unreliable); *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980), *review denied*, 95 Wn.2d 1013 (1981) (a rape victim's statement to a friend three hours later, and her later statements to police were admissible as an excited utterance, where the victim remained fearful and upset during that time period).

Even if a declarant fabricates a portion of his or her statement, it may still be admissible as an excited utterance. For example, in *Young*, the court found corroborating evidence of a startling event even though an eleven-year old victim recanted her allegations of sexual abuse at trial. *Id.* at 817. Three witnesses testified at a pretrial hearing about the victim's condition while making the allegations, and others testified at trial about the defendant's incriminating statements and actions afterward. *Id.* at 818-19. The trial court concluded that this, along with the fact that she came directly

from her own house, to across the street, corroborated her statements as an excited utterance. *Id.* The Supreme Court held that the admissibility of the victim's statements based on this evidence alone would be a "close question," but found that additional evidence presented at trial provided "ample circumstantial evidence" to independently corroborate that a startling event occurred. *Id.* at 819.

In like manner, in *Magers*, 164 Wn.2d at 188, the Supreme Court concluded that even though an assault victim told the police a falsehood "does not mean that the remainder of her statements were not spontaneous and truthful," and held that her statements to an investigating officer were admissible as excited utterances. There, someone other than the victim called 911, and when the police responded and asked the victim if the defendant was at the house, she said he was not there but later admitted this was not true. The court rejected the defendant's argument that the victim's statements were not excited utterances because the victim had the capacity to consider her situation and decide not to respond truthfully. The court noted that it was reasonable to conclude that her initial statement to the officer that the defendant was not at her home was due to her fear of the defendant. *Id.*

Similarly, in *Woods*, 143 Wn.2d at 601, our high court held that an attempted murder victim's statements were excited utterances, even though

she omitted details that pertained to the credibility of the statements. While at the hospital after being attacked, the victim told her father that she awoke to somebody holding a knife to her who took her to another bedroom, pointed to her friend who had been badly beaten, and told her that she would end up like her friend if she did not do exactly what he said. *Id.* at 596. The defendant argued that the statement was not an excited utterance because the victim failed to tell her father that she had been out drinking, that she wanted to buy drugs from the defendant and that she was still up and ready to “party.” Thus, the defendant argued, she had time to reflect and consider her own self-interest before making the statement. *Id.* at 600.

The Supreme Court declined to hold that these omissions were the same as those fabricated by the victim in *Brown*:³

Unlike the situation in *Brown*, there is no evidence here that [the victim] had spun a story so that she would sound more credible to the authorities. Even if we assume that [the victim] consciously omitted certain information from her statements to her father, we do

³ In *State v. Brown*, 127 Wn.2d 749, 903 P.2d 459 (1995), the court held that a rape victim's statements made during a 911 call were not admissible as excited utterances when she openly fabricated part of her statement and made the decision to fabricate it before calling the police. *Id.* at 749. There, the victim called 911 and reported that she was abducted, forced into an apartment, and raped repeatedly by four men at gunpoint. *Id.* at 752. She later admitted that she was not abducted, but went willingly into the apartment after agreeing to engage in oral sex with the defendant for money. *Id.* After the attack, she told her boyfriend she was reluctant to call 911 because she thought the police would not believe her if she admitted that she went willingly into the apartment and because the police knew she was a prostitute. *Id.* at 753. The boyfriend then suggested that she “think of something.” She admitted that after the conversation with her boyfriend, she decided to tell the police that she had been abducted. *Id.*

not believe her act of omission is at all comparable to the deception we observed in Brown. The alleged victim in Brown affirmatively hatched a story to bolster her own credibility. [The victim here], on the other hand, merely failed to relate information about certain events in the evening. The fact that [she] failed to provide details about the previous night during her brief encounter with her father, especially after being brutalized in such an egregious manner, is not comparable to the fabrication of fanciful statements that we saw in Brown.

Woods, 143 Wn.2d at 600.

Here, there was approximately 20 to 30 minutes elapsed from the time of the event until Ms. Pritchard made statements to the deputies. The elapsed time was not enough time, as established by the above referenced case law, to establish Ms. Pritchard was no longer under the influence of a startling event.

When Deputy Schmidt contacted Ms. Prichard, although able to converse, she had to stop multiple times during the conversation to cry and sob. RP 105. The deputy described Ms. Pritchard as “very hysterical throughout the interview and conversation.” RP 106. Ms. Pritchard appeared to be under the stress of the event when the deputy spoke with her. RP 106.

Mr. Kelly suggests that Ms. Pritchard had time to collect herself from the time she called 911 to when deputies arrived at the residence. *See* Appellant’s Br. at 9. More specifically, he asserts during that time frame, Ms. Pritchard left the residence, she cared for her children, placed them with

her mother, and stood in the driveway removed from the defendant. *Id.* The record reflects differently. At trial, Ms. Prichard testified she called her mother to remove the children from the residence. RP 154. Her mother and several siblings arrived within a couple of minutes. RP 154. Her mother took the children away from the residence and Ms. Pritchard waited near a vehicle, with her siblings, until deputies arrived. RP 154.

Other than innuendo, Mr. Kelly points to *nothing* in the record supporting his claim that Ms. Pritchard fabricated her story to the deputies or that she did not continue to be under the influence of the assault. Indeed, Ms. Pritchard's demeanor and physical injury establishes otherwise. The defendant has not demonstrated the trial court abused its discretion when it admitted this testimony as an excited utterance.

B. IF THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED MS. PRITCHARD'S STATEMENTS TO THE DEPUTY AT THE SCENE, ANY ERROR, WAS HARMLESS AS IT DID NOT PREJUDICE THE DEFENDANT AT TRIAL.

Even if error, an appellate court will not reverse a conviction if the evidentiary error did not prejudice the defendant. *Thomas*, 150 Wn.2d at 871. An evidentiary error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.* at 871. The improper admission of evidence is harmless if the evidence is of minor significance regarding the overall

evidence. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Moreover, a trial court's erroneous admission of hearsay statements is harmless when the jury has heard substantially similar testimony without objection. *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007).

For example, in *State v. Ramirez-Estevez*, 164 Wn. App. 284, 293, 263 P.3d 1257 (2011), *review denied*, 173 Wn.2d 1030 (2012), a child rape case, the trial court permitted an elementary school counselor to testify regarding statements made by a child victim two years after the crimes. *Id.* at 284, 290. The reviewing court held the admission of the statements was harmless error:

The jury heard [the child victim's] detailed testimony about Ramirez-Estevez's multiple rapes and observed her demeanor on the witness stand, including during cross-examination by Ramirez-Estevez's trial counsel. Being subject to such cross-examination itself diminished, if not extinguished, the type of prejudice that sometimes results from admission of hearsay where the declarant is not subject to cross-examination at trial. In this way, [the child victim's] live testimony in front of the jury eclipsed her earlier consistent recounting of the events to Wilcox and [the child victim's] and more than sufficiently supported the jury's verdict.

Id. at 293.

Similarly, in *State v. Dixon*, 37 Wn. App. 867, 684 P.2d 725 (1984), the court held that a detailed written statement taken several hours after the event did not qualify as an excited utterance even though the victim was

crying and upset. However, the court held the error but was harmless because the trial judge heard the same evidence testified to by the victim as was included in the erroneously admitted written statement.

Here, Ms. Pritchard testified to the same details of the attack and she was subject to cross-examination regarding her previous statements made at the scene and the circumstances under which she made those statements. Additionally, her physical injury substantiated her prior statements to the deputy and her testimony. The evidence of guilt was overwhelming, and the admission of the excited utterance, if error, was harmless error as it did not prejudice the defendant, and was cumulative with Ms. Pritchard's trial testimony.

C. THE COURT ONLY IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS; NO INQUIRY INTO THE DEFENDANT'S ABILITY TO PAY WAS REQUIRED.

1. The defendant may not raise this legal financial obligation (LFO) claim for the first time on appeal.

At the time of sentencing, the trial court imposed a \$500 victim assessment and \$200 court costs. RP 276; CP 69. Mr. Kelly did not object to the court's imposition of these costs. At time of sentencing, the court remarked:

Mr. Kelly, I frankly could care less about these LFOs but the law doesn't give me any ability to waive them so I have to order them even though I don't believe in them. I'd rather have the money go to your child support or something else or assistance of your daughter but not to the State but I don't

have any ability to waive it, so I have to order the \$500 victim impact, 200 in court costs...

RP 276.

It is a fundamental principle of appellate jurisprudence in Washington that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

Strine, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor not allowing review of this belatedly raised issue. *See State v. Stoddard*, 192 Wn. App. 222, 226-27,

366 P.3d 474 (2016) (alleged substantive due process violation was not manifest error; refusing to consider it as unpreserved).

Additionally, any error in the trial court's imposition of mandatory costs is not manifest. *State v. Shelton*, 194 Wn. App. 660, 670-72, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002 (2017). This Court should not accept defendant's invitation to review an issue he failed to preserve in the lower court.

2. The LFOs imposed were mandatory and the trial court was not required to ask about the defendant's past, present, or future ability to pay.

The defendant claims, without support or citation to authority, that the trial court was required to inquiry into Mr. Kelly's ability to pay the \$200 filing fee and the \$500 victim assessment fee. Appellant's Br. at 11-12.

Both LFOs imposed at Mr. Kelly's sentencing are mandatory. RCW 36.18.020(2)(h) ("Upon conviction or plea of guilty ... an adult defendant in a criminal case *shall* be liable for a fee of two hundred dollars") (emphasis added); RCW 7.68.035(1)(a) ("[T]here *shall* be imposed upon such convicted person ... five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor") (emphasis added).

Accordingly, mandatory assessments by the trial court are made without consideration for the defendant's ability to pay. Indeed, this Court resolved the issue in *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013), finding that imposition of the \$500 victim assessment and \$100 DNA collection fee are mandatory, irrespective of a defendant's ability to pay. Likewise, in *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), Division Two of this Court held the mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate without the court's discretion by legislative design.

Because these LFOs are mandatory, no inquiry need be made into the defendant's inquiry to pay, and, as above, absent an objection to the imposition of costs without such an inquiry, the claim of error is unpreserved.

3. Mr. Kelly has not established an equal protection violation regarding the imposition of mandatory costs after conviction.

For the first time on appeal, Mr. Kelly claims that imposition of the mandatory costs violates equal protection because GR 34, authorizing civil litigants a waiver of fees imposed under the statute, does not allow the same for criminal defendants. This assertion is without merit. It is the court rule, not the statute, that authorizes the waiver. The statute makes the fees

mandatory to all within its application. Defendant fails to make a claim that GR 34 violates equal protection.

Secondly, Mr. Kelly's equal protection argument is perfunctory. He cites no cases dealing with the application of GR 34 in a criminal context. Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Petition of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). Therefore, this Court should not consider this new argument.

Furthermore, there is no equal protection violation present in either of the challenged statutes, RCW 36.18.020(2)(h) or RCW 7.68.035, or the court rule, GR 34. The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee equal protection under the law. "Equal protection requires that similarly situated individuals receive similar treatment under the law." *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). This Court reviews constitutional challenges de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010); *State v. Price*, 169 Wn. App. 652, 655-56, 281 P.3d 331 (2012).

The appropriate level of review in equal protection claims depends on the nature of the classification or the rights involved.

State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Appellate courts apply a strict scrutiny standard when state action involves suspect classifications like race, alienage and national origin and/or fundamental rights. *Id.* Intermediate scrutiny is applied for semi-suspect classifications and/or important rights. *Id.* Otherwise, courts apply rational basis review. *Id.*

Rational basis review is a highly deferential standard, and courts will uphold a statute under this standard unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *In re Det. of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate state goal; the means do not have to be the best way to achieve the goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994).

There is a rational basis for treating civil litigants *entering* the justice system differently than indigent criminal defendants *already in* the system, who have been convicted of a criminal offense. The former group seeks access to justice; the later has received access to justice. It is only upon a criminal defendant’s conviction that he or she is required to pay certain

mandatory costs, including a filing fee. GR 34 allows the waiver of mandatory filing fees for indigent civil litigants *to provide equal access to justice*. *Jafar v. Webb*, 177 Wn.2d 520, 526-32, 303 P.3d 1042 (2013). Without such a waiver, civil indigent parties would be prevented from seeking relief in the courts. *Id.* at 529-31.

Lastly, criminal defendants are authorized to seek remission of these mandatory costs under RCW 10.01.160(4), under the same criteria as that providing waiver of fees to indigent civil litigants under GR 34. “[C]ourts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs.” *City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). There is no real difference in the procedure. The defendant in the present case has failed to establish, as is his burden, an equal protection violation.

IV. CONCLUSION

The trial court did not abuse its discretion when it permitted the admission of statements made by the victim at the scene as excited utterances. The defendant has not identified *anything* from the record which establishes the victim had the motive or opportunity to fabricate her statements to law enforcement at the scene. If error, it was harmless as the victim testified at trial and was subject to cross-examination.

Regarding the fees imposed by the trial court, this Court should find that Defendant's claim is barred under RAP 2.5. Moreover, these court costs and the victim assessment fee are mandatory irrespective of the defendant's ability to pay. Finally, the defendant has failed to establish an equal protection violation.

For the reasons stated herein, the State respectfully requests this Court affirm the judgment and sentence.

Dated this 21 day of November, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

RICK KELLY,

Appellant.

NO. 34947-1-III

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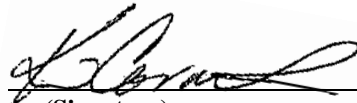
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